No. 14886

United States Court of Appeals

For the Ninth Circuit

HENRY RAGONTON RABANG, *Appellant,*

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization Service, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLANT'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

A. Statutory provisions believed to sustain jurisdiction.

Jurisdiction of the District Court was invoked under the following provisions:

(1) Title 28, United States Code, Section 2241, 62 Stat. 964, as amended, particularly as follows:

> "(A) Writs of habeas corpus may be granted by . . . district courts . . . within their respective jurisdictions . . ."

(2) Title 28, United States Code, Section 2201, 62 Stat. 964, as amended, particularly as follows:

> "In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any inter-

ested party seeking such declaration. . . . Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

(3) Title 5, United States Code, Section 1009, 60 Stat. 237, as amended, particularly as follows:

"(a) Any person suffering legal wrong because of any agency action or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

Jurisdiction of the Court of Appeals for the Ninth Circuit is invoked under the following provisions:

(1) Title 28, United States Code, Section 2253, 62 Stat. 967, as amended, particularly as follows:

"In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had . . ."

(2) Title 28, United States Code, Section 1291, 62 Stat. 929, as amended, particularly as follows:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.

B. Statute, the validity and interpretation of which is involved.

Petitioner was ordered deported pursuant to the provisions of former Title 8, U.S.C., Section 156(a), being the Act of February 18, 1931, c. 224, 46 Stat. 1171, as amended by the act of June 28, 1940, c. 439, Title II, Section 21, 54 Stat. 673, which provides:

"Any alien (except an addict who is not a dealer in, or peddler of, any of the narcotic drugs mentioned in this act) who, after the enactment of this act, shall be convicted for violation of or conspiracy to violate any statute of the United States . . . taxing, prohibiting, or regulating the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, . . . shall be taken into custody and deported . . ."

C. Reference to pleadings showing existence of jurisdiction.

Appellant is held in the custody of appellee, within the jurisdiction of the district court (R. 4, 5, 8, 12).

Appellant has exhausted his administrative remedies, and is entitled to judicial review of his deportation proceedings (R. 7, 13, 14).

There exists an actual controversy between appellant and appellee within the jurisdiction of the district court (R. 4, 5, 12).

CONCISE STATEMENT OF THE CASE

Appellant was born a national of the United States in the Philippine Islands, and is a permanent resident of Seattle, King County, Washington, and he has resided continuously in the United States of America since January 24, 1930 (R. 5). Petitioner, at the time of coming to the United States as a national declared his intention of being a permanent resident of the United States, and petitioner has, at all times herein

involved, intended to become a United States citizen (R. 5, 55).

On or about March 21, 1951, petitioner was arrested pursuant to a warrant of deportation which charged that he was an "alien" found in the United States in violation of the immigration laws thereof, and is subject to be taken into custody and deported pursuant to . . . The Act of February 18, 1931, as amended, in that, on or after June 28, 1940, he has been convicted of the violation of a law relating to traffic in narcotics . . ." (R. 49, 6).

A deportation hearing was held by the Immigration Service. (The record before the Service is Appended to the Return of Appellee. See: R. 16-60.)

At this hearing appellant was the sole witness, at which time he answered, as follows, with reference to his citizenship:

"Q When and where were you born?

A I was born in the Islands, in the Philippine Islands, on April 23, 1910.

Q Of what country are you now a citizen?

A Well, I am an American because I was born under the American flag.

Q Did you ever acquire United States citizenship?

A Well, no, sir, because I know I am an American, you know."

* * * *

"Q You claim you are an American because you were born in the Philippine Islands then?

A Yes, sir.

Q You never acquired United States citizenship through any other method that you know of?

A No, sir." (R. 33)

Appellant admitted that he had been convicted of a charge involving narcotics and he was sentenced to six months in jail, which sentence was suspended, and he was placed on three years' probation (R. 58). Appellant lived up to the terms of his probation and was duly discharged therefrom (R. 6, 7).

Petitioner exhausted his administrative remedies, including an appeal to the Board of Immigration appeals, and thereafter sought judicial review of said order, including an appeal to this court. That said appeal was dismissed through lack of prosecution because petitioner was without funds, and because it was believed by petitioner, and by the local Immigration and Naturalization Service, that appellant's case would be determined by the appeals in the cases of *Mangoang v. Boyd, Gonzales v. Boyd,* and other cases pending before the above-entitled court, and involving the status of Filipinos residing in the United States, and who came to the United States prior to the Philippine Independence Act of 1934 (48 Stat. 462) (R. 7).

The Immigration and Naturalization Service itself moved to dismiss the order of deportation (R. 21) based upon the decisions in said cases, but the Board of Immigration Appeals refused to dismiss, and maintained that appellant was an alien, and that "entry" was not a precondition to deportation (R. 17).

Appellant, on May 25, 1955, filed a petition for Writ of Habeas Corpus, show cause, and Declaratory Judg-

ment with the United States District Court, Western District of Washington, Northern Division (R. 4-10), in which he alleged that he is a national of the United States, and not an alien (R. 8), that said conviction was not a conviction after "entry" as is required by the immigration laws, and that a deportation of appellant would deprive him of due process of law under the 5th Amendment of the United States Constitution (R. 8).

An order to show cause was issued by the Honorable William J. Lindberg, District Judge (R. 11).

Appellee filed his return (R. 12), and the record of administrative proceedings as a part thereof (R. 16), and in substance, admitted the factual allegations, and denied the legal issues presented by appellant.

Upon hearing, no oral testimony was taken. Briefs were submitted (R. 61, and R. 65-96).

Thereafter, on July 29, 1955, the court signed Findings of Fact and Conclusions of Law (R. 98), and entered an Order dismissing the application for habeas corpus and other relief (R. 101). The court found as a fact "That Petitioner is a native of the Philippine Islands, an alien who has never been naturalized nor has otherwise become a citizen of the United States" (R. 98).

Notice of appeal, and cost bond, were filed on August 19, 1955.

SPECIFICATION OF ERRORS

(1) The district court erred in concluding that appellant is now an alien.

(2) The district court erred in concluding that the power of deportation is not based upon the power to exclude, and that one who did not "enter" the United States, but came here as a National, can lawfully be deported.

(3) The district court erred in concluding that a United States National can be divested of such nationality in the absence of a voluntary act on the part of the individual to shed such nationality, and *a fortiori* the executive or judiciary may not infer the loss of nationality of a resident of the United States solely from the fact that independence is granted to those residing in the territory in which the national was born.

SUMMARY OF ARGUMENT

The power to deport is implied from, and depends upon, the power to exclude: a condition precedent to entry is extended as a condition subsequent to entry. *Harisiades v. Shaughnessy,* 342 U.S. 580, 72 S.Ct. 512, 96 L.ed. 586. Appellant never entered the United States (he was not excludable): *Del Guerico v. Gabot* (C.A. 9, 1947) 161 F.(2d) 559; *Toyota v. United States,* 268 U.S. 402; *Gonzales v. Williams,* 192 U.S. 1; *Barber v. Gonzales,* 347 U.S. 637. He can not, therefore, be deported.

Expatriation is primarily a matter of intent. Appellant was born a national of the United States and came to this country as a matter of right: *Toyota v.*

United States (1925) 268 U.S. 402, 45 S.Ct. 563, 69 L.ed. 1016. This status is important, and superior to property rights; coupled with appellant's change of position (coming to the United States for permanent residence) acting upon that status, Congress is without power to deprive appellant of that status, and the reasoning in *Cabebe v. Acheson* (C.A. 9, 1950) 183 F.(2d) 795, should be reconsidered, particularly in view of the fact that the United States Supreme Court in *Barber v. Gonzales,* 347 U.S. 637, 98 L.ed. 1009, 74 S.Ct. 822, specifically saved that issue, and did not approve prior pronouncements of this court that persons of Filipinos origin who came here prior to the Philippine Independence Act of 1934, and have resided here continuously thereafter are now aliens.

ARGUMENT

Point I. Appellant Is Not Now an Alien, But He Is a National of the United States.

The District Court has concluded that appellant is now an alien. The undisputed facts are: Appellant was born a national of the United States in the Philippine Islands on April 23, 1910 (R. 33). He came to the United States for permanent residence on January 24, 1930. He has never left the United States since that time, and he has at all times considered himself an "American," and has, at all times since his arrival, intended to become a United States citizen.

Appellant's present alleged alienage is based solely on executive and judicial inference based on the Treaty of Independence, 61 Stat. 1174, and Presidential Proclamation No. 2695, 11 F.R. 7517, providing for the po-

litical independence of the Philippine Islands, but being silent as to the status of Filipinos who were permanent residents in the United States prior to 1934: see *Cabebe v. Acheson* (C.A. 9, 1950) 183 F.(2d) 794, 801.

Solely on those facts it is urged by appellee that appellant is now an alien as a matter of law.

Prior to the Treaty of Independence of 1946, 61 Stat. 1174, appellant was not an alien, but was a national of the United States: *Toyota v. United States* (1925) 268 U.S. 402; *Gonzales v. Williams* (1904) 192 U.S. 1; *Barber v. Gonzales,* 347 U.S. 637.

In *Barber v. Gonzales,* 347 U.S. 637 (*supra*), the effect of the court's decision was to bar the deportation of virtually all Philippine residents of the United States who came to the United States prior to 1934, on the ground that they had not made an "entry" into the United States by virtue of their nationality. In that case, Gonzales also argued that he was not an "alien," and the Supreme Court specifically did not approve the decision of the above-entitled court, which had ruled that Gonzales was then an "alien," and stated: "Our disposition of the case makes it unnecessary to consider these contentions" (Note 4).

In view of the fact that the Supreme Court did not approve the dicta of the above-entitled court, it is submitted that this court should examine the issue anew.

A.

The contention is that by virtue of the United States-Philippine Independence Treaty and the Presidential

Proclamation of July, 1946 (*supra*), the appellant was divested of his nationality and thereupon cloaked with alienage. Such conclusion has never been decided by the Supreme Court. It presently rests upon the rationale of the court below in the case of *Cabebe v. Acheson,* 183 F.(2d) 795, wherein it was declared:

> " * * * the Philippine Islands came to the United States by cession. And, by such acquisition many individuals became nationals of the United States. Later, the United States relinquished sovereignty over them and their country. It follows that Filipino nationals of the United States inhabiting the Island at the date of such relinquishment lost the status of nationality. The narrower question follows: Does such loss also occur as to Filipino-nationals of the United States domiciled in the United States? * * * " (p. 880)
>
> " * * * The status of United States nationality for Filipinos was the direct result of the United States' assumption of sovereignty over the Islands. When the United States relinquished its sovereignty, there remained no basis for such status.
>
> "The United States had it desired it, could have provided that Filipinos permanently residing in the United States would not lose their United States nationality upon the recognition of Philippine independence * * *.
>
> "The question is not directly answered (but, as we think, it was inferentially answered) * * *. (p. 801)
>
> " * * * It is our conclusion that the United States government intended the status of Filipinos, regardless of domicile or place of residence at the date of Philippine independence, to be en-

tirely separate from any phase of adherence to the United States." (p. 802)

The power of the United States as a sovereign nation to cede, dispose of or otherwise relinquish its sovereignty, *nolens volens,* over parts of its territory, *together with the inhabitants residing therein subject to American sovereignty,* is not here challenged. Presuming this to be an incident of sovereignty, *Jones v. United States,* 137 U.S. 702; *DeLima v. Bidwell,* 182 U.S. 1, it becomes an entirely different proposition to assert as an incident of sovereignty the right to expatriate or divest of nationality, *nolens volens* (and expel from this country) nationals of the United States residing outside the ceded territory and within the jurisdiction of the United States at the time of cession, because of birth within said territory.

It is appellant's contention that the rights of nationals so situated are no different than would be those of United States citizens.

B.

United States citizens cannot be divested of their nationality except through expatriation. The fundamental basis for expatriation is that there must be a voluntary act on the part of the individual to shed his nationality. In *Perkins v. Elg,* 307 U.S. 325, 334, the court said:

"Expatriation is the voluntary renunciation or abandonment of nationality and allegiance." To the same effect, see *Savorgnan v. United States,* 338 U.S. 491, 497, 498; *MacKenzie v. Hare,* 239 U.S. 299.

That Congress cannot by fiat declare a loss of nationality has been held by this Court on many occasions. In discussing that proposition the Court said in *United States v. Wong Kim Ark,* 169 U.S. 649, 703:

> "The power of naturalization, vested in congress by the constitution, is a power to confer citizenship, not a power to take it away. 'A naturalized citizen,' said Chief Justice Marshall, 'becomes a member of the society possessing all the rights of a native citizen and standing, in the view of the constitution, on the footing of a native. The constitution does not authorize congress to enlarge or abridge those rights. The simple power of the national legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The constitution then takes him up, * * *. Congress having no power to abridge the rights conferred by the constitution upon those who have become naturalized citizens by virtue of acts of congress, *a fortiori* no act or omission of congress, * * * can affect citizenship acquired as a birthright, by virtue of the constitution itself, without any aid of legislation. The fourteenth amendment, while it leaves the power, where it was before, in congress, to regulate naturalization, has conferred no authority upon congress to restrict the effect of birth, declared by the constitution to constitute a sufficient and complete right to citizenship."

C.

It is undisputed that appellant never voluntarily renounced or abandoned his United States nationality or committed any act inconsistent with the rights or obligations of such nationality. It is urged by the govern-

ment, however, that appellant and all other persons of Filipino birth residing in this country prior to 1934, automatically lost their nationality by the treaty establishing the independence of the Philippine Islands.

If nationality is analogous to, and cloaked with the same protection that is accorded citizenship, then clearly appellant could no more be divested of his nationality by that treaty, *residing as he did in this country,* than if he were a citizen. For the Philippine Independence Act of 1934 and the Treaty constituted no voluntary act of renunciation or self-expatriation on the part of appellant. He did not vote on the ratification of the Independence Act of 1934; nor could he have voted thereon so long as he elected to remain within this country.

Is nationality, then, analogous to and protected like citizenship? Either it is, or else it must be analogous to alienage, for the constitution with respect to nationality recognizes only the two categories.

The Constitution speaks of "citizens" and "natural born citizens" of the United States in Article I and Article II, and of "citizens or subjects" of foreign states in Article III. Before the passage of the Fourteenth Amendment it contained no definition of citizen. The Fourteenth Amendment says in its opening sentence, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." The term "national" does not appear anywhere in the Constitution of the United States.

Because of this particularity in the language of the Constitution, any status recognized by the law, other

than that of citizenship or alienage, must be assimilated to citizenship or alienage if it is to comport with the Constitution. Distinctions may be made among citizens, and also among aliens, but any classes or subclasses into which citizens or aliens may be divided may not combine the two major and mutually exclusive classes recognized by the Constitution. Unless this is so, the words of the Constitution are meaningless. An alien has been defined by this court in *Low Wah Suey v. Backus,* 225 U.S. 460, 473, as:

> "One born out of the jurisdiction of the United States, and who has not been naturalized under their Constitution and laws."

The essence of this definition is birth outside of the jurisdiction of the United States. This is the characteristic which distinguishes the alien and sets him apart in a class different from the citizen and national. Appellant having been born under the jurisdiction of the United States, lacked this essential characteristic of alienage. On the other hand, he was endowed with the positive essential characteristic of citizenship, to-wit: *birth within the jurisdiction of the United States.*

Next to birth, the all-important requirement and characteristic of citizenship is allegiance and fealty to the government. And this, too, is a concomitant of nationality. Speaking of persons born in the Philippine Islands, this court said in *Toyota v. United States* (*supra,* 1940):

> "The citizens of the Philippines are not aliens. See *Gonzales v. Williams,* 192 U.S. 1, 13. They owe no allegiance to any foreign government."

In the earlier case of *Fourteen Diamond Rings v. Unit-*

ed States, 183 U.S. 176, this court in referring to the Philippine Islands, said, "Their allegiance became due to the United States and they became entitled to its protection" (p. 179).

In the Nationality Act of 1940, 54 Stat. 1137, 8 U.S.C. 501 (b), adopted after the Philippine Independence Act, congress equated nationals with citizens:

> "The term 'national of the United States' means (1) a citizen of the United States, or (2) a person who, though not a citizen of the United States, owes permanent allegiance to the United States. *It does not include an alien.*" (Emphasis supplied)

This concept, expressed in the 1940 Act was carried forward in the present 1952 law. Section 101(a)(3) of the Act, 8 U.S.C.A. 1101(a)(3), defines an alien to be

> "Any person not a citizen of the United States."

and it defines a national of the United States (Section 101(a) (22) 8 U.S.C.A. 1101(a) (22)) as:

> "(A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States."

As part of his allegiance, a national is subject to the duty of bearing arms and giving his life, if need be, in defense of this country. This appellant and all native born Filipinos in this country have been subject to that duty and obligation *equally with all citizens.*

Thus, by the similarity of birth under United States jurisdiction; by the similarity of like allegiance to this country; by the similarity of like obligation to serve, defend and safeguard this country; by the similarity of the like protection due to them from this country,

nationals have been equated with citizens. On the other hand, in no significant characteristic can they be equated with aliens. In fact, in every decision of this Court, where the character of nationality had been discussed, the Court was sharp to point out that nationality cannot be equated with alienage. *Gonzales v. Williams, supra; Toyota v. United States, supra.*

It must therefore follow, that nationality, like citizenship, may not be lost, divested, forfeited or impaired without a voluntary act of renunciation or abandonment. Appellant, therefore, is still a national.

Assuming, however, that power to expatriate nationals resides in Congress, it is not seriously contended that Congress has so acted with reference to Filipinos residing in this country prior to the adoption of the Independence Act of 1934. This was admitted by the court in the *Cabebe* case (*supra*) when it held a loss of nationality had taken place. The Court said:

> "The question is not directly answered but, as we think, it was inferentially answered) * * * *there is no special reference of inclusion or exclusion in any of these acts to Filipinos who were no longer residing in the Islands on the date of their independence."* (p. 801)

The Court there relied upon various acts of Congress from which it drew an inference that Congress must have intended to denationalize Filipinos residing in the United States.

Respondent's nationality, with which he was born, and which he has at all times maintained by unequivocal acts, may not be taken away by inference. See, *Mandoli v. Acheson,* 344 U.S. 133. In upholding United

States nationality in *Perkins v. Elg,* 307 U. S. 325, 337, this Court said:

> "If the abrogation of that right [to elect nationality] had been in contemplation, it would naturally have been the subject of a provision suitably explicit. Rights of citizenship are not to be destroyed by an ambiguity."

The Court has never been unmindful that the law abhors forfeitures and will favor that construction of a statute which avoids such result. *Washington Pub. Co. v. Pearson,* 306 U.S. 30, 41; *United States v. One Ford Coach,* 307 U.S. 219, 226; *Knickerbocker Life v. Norton,* 96 U.S. 234, 242. Expatriation of respondent is a forfeiture of the nationality he obtained by birth—a forfeiture which deprives him of "all that makes life worth living." In a case involving the construction of a deportation statute, the Court said:

> "We resolve the doubts in favor of that construction [avoiding deportation] because deportation is a drastic measure and at times the equivalent of banishment or exile, * * * It is the forfeiture * * * of a residence in this country. Such a forfeiture is a penalty * * * since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used." *Fong Haw Tan v. Phelan,* 333 U.S. 6, 10.

If resulting deportation evoked such concern from the Court because it is a forfeiture of residence in the United States, how much more should the Courts be concerned where an implied construction is being used to deprive respondent, not only of his residence, but of

his birthright his United States Nationality. See also *Bennett v. Hunter,* 76 U.S. 326, 336.

If this issue were one of contract law and property rights, the change of position incurred by appellant upon the reliance of his United States nationality would remove any question of his right to the protection of this Court. Surely the Constitution of this country gives appellant as much protection as the common law of contracts!

It is further to be noted that nationality, and particularly as relates to retention of one's original nationality, is a matter of intent. Whatever theoretical ties that appellant may have had with the Philippines, as soon as the Treaty of Independence was ratified he unequivocally expressed his intent to remain a national of the United States, and forego any claim of Philippine nationality. Yet the government argues that this nationality, with which appellant was born, may be taken away by inference from a treaty.

Returning to the *Cabebe* case, it is important to call the Court's attention to the fact that while the Court stated the problem as one applying to a person born in the Philippines, and domiciled in the United States, the issue actually before the court involved only a person domiciled in Hawaii. In section 8 of the Independence Act of 1934, 48 Stat. 462, Congress provided that residence in Hawaii was not equivalent to residence in the United States; thus, after 1934, a Filipino could enter the Hawaiian Islands without restriction, but he could not enter the continental United States except as a quota immigrant. It becomes clear, therefore, that

the facts involved in the *Cabebe* case are not in any way decisive of the issue of appellant's nationality, since he actually came to the continental United States for permanent residence in 1930.

For the foregoing reasons, it is respectfully submitted that *Cabebe v. Acheson* (C.A. 9, 1950) 183 F.(2d) 795, is not determinative of appellant's status, and that since appellant has elected to *retain* his United States nationality, Congress, by treaty or otherwise, can not deprive him of that status, without denying him life and liberty without due process of law.

CONCLUSION

For the above reasons it is therefore respectfully submitted that the deportation order herein should be set aside and appellant released from all further custody of appellee.

Respectfully submitted,

C. T. Hatten,
Attorney for Appellant.

November 17, 1955.